Date: July 31, 1997

Case No.: 95-INA-00555

In the Matter of:

NAFTALI KOCH,
Employer

On Behalf Of:

GRAZYNA PAZDZIOR,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 9, 1994, Naftali Koch ("Employer") filed an application for labor certification to enable Grazyna Pazdzior ("Alien") to fill the position of Cook, Kosher (AF 4-5). The job duties for the position are:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on April 19, 1995 (AF 41-44), proposing to deny certification on the grounds that it does not appear that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO advised the Employer to provide evidence which clearly establishes that the position, as performed in the Employer's household, constitutes full-time employment. Additionally, the CO determined that one U.S. applicant, Emmerson Herbert, was rejected for other than lawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6) (recodified as § 656.21(b)(5)) and § 656.20(c)(8).

Accordingly, the Employer was notified that it had until May 24, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 23, 1995 (AF 45-73), the Employer provided a daily and weekly schedule of cooking duties, accounting for eight hours per day, 40 hours per week. The Employer stated that his household consists of himself, his son and daughter-in-law, and their three children. The Employer further stated that the cook will not be required to cook for any guests. Additionally, the Employer contended that his wife cooked all meals for the household prior to her death. The Employer further contended that all household maintenance duties are done by members of his household, and all cooking duties are performed by restaurants, catering services, and often his daughter. The Employer attached a letter from Cachet Gourmet stating

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

that he orders "ready-to-eat meals ... on weekly basis," a copy of his wife's death certificate, and a copy of several recipes.

Regarding recruitment, the Employer stated that U.S. applicant Emmerson Herbert was contacted by certified mail but did not respond. The Employer attached a copy of his letter with the certified mailing receipt to his rebuttal. Further, the Employer noted that U.S. applicant Herbert did not indicate any experience with kosher cuisine.

The Employer also attached to his rebuttal a note from Dr. Emanuel Schiowitz stating that the Employer needs "special cooking" for a gastrointestinal problem.

The CO issued the Final Determination on June 2, 1995 (AF 74-76), denying certification because it does not appear that a full-time job opportunity exists in this six-person household, of which two members are absent for most or all of the cook's working hours. The CO further stated that it appears that this position was created "solely for the purpose of qualifying the Alien for a visa as a skilled worker ... ."

On June 15, 1995, under cover letter dated June 16, 1995, the Employer requested review of the Denial of Labor Certification (AF 77-86). On August 9, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 42-43). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled

time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In his rebuttal, the Employer provided a daily and weekly schedule of the Alien's cooking duties (AF 71-72). In addition, the Employer provided recipes for meals that the Alien will be required to cook (AF 45-61). He stated that, before his wife passed away, she did all of the cooking (AF 69-70). The Employer further stated that the Alien will not be required to cook for guests and she will not be required to perform household maintenance duties (AF 70). Finally, the Employer explained that his son works from 9:00 a.m. until 5:00 p.m. and his son's daughter attends school from 9:00 a.m. until 3:00 p.m. (AF 69). He stated that the other children are under the supervision of their mother.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. The Employer has indicated the conditions of employment on the Application for Alien Employment Certification form ETA 750, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9)). These conditions of employment state that 40 hours of employment are being offered per week at a wage of $12.81 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employer's assertion that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that the meal in question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best.

Therefore, we find that the CO's conclusion, that full-time employment is not being offered, is not supported by sufficient evidence, and that this matter must be **REMANDED** for further findings of fact.

Further, on remand, the CO is directed to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT).

ORDER

the Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I don't disagree that the conclusion reached by the majority is reasonable. On remand, I would direct the CO's attention, as well as the Employer/Alien, to the case of *Teresita Tecson*, 94-INA-014 (May 30, 1995), wherein it was held that a three-month requirement for experience in Filipino cooking was found unduly restrictive. My research reveals no cases of "specialty" or "ethnic" domestic cook cases decided by the Board to the contrary. In my opinion, the burden of demonstrating that the requirement of an "ethnic" type of cooking such as "kosher cook" for a cook/domestic is high, since, as stated in *Tecson*, "[t]he business in this case is the operation of the household." If an employer "prefers" a certain type of cooking, he can, of course, instruct the cook to do so. However, to require such experience as a part of the job opportunity has a "chilling effect" on U.S. workers who might otherwise be qualified and willing to do the job. In that connection I note that in this case there were willing U.S. applicants who were rejected because they were not experienced in "kosher cooking." This is a basis for denial of certification, even though not cited by the CO since it is a *prima facie* deficiency.

I, also, find difficulty in accepting the Employer's statement as true since he has ". . . indicated the conditions of employment . . . under penalty of perjury," if that is what the majority implies. The opportunity for abuse of the labor certification process merely because an employer is swearing under oath to conditions of employment which are known entirely by him or her would appear self-evident. Thus, while skepticism is warranted on the part of the CO, such skepticism must be based on the individual facts of the case and supported by either a failure of the Employer to fully justify his schedule established to demonstrate the need for a full-time cook, or to furnish documentation on which a decision an be made. *Gerata Systems* and *Collectors, supra*. I would further point out that specific investigatory authority other than mere request for documentation to justify a requirement under the Act is available to the CO and may be used should the CO determine that the opportunity in the individual or a series of cases for abuse is being attempted. On the other hand, mere speculation on the part of the CO should not be a basis for inhibiting the certification of legitimate applications as is provided for under the Act.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.